

Message Text

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TAGS: EAIR, GW

SUBJECT: CIVAIR: NOTE TO FRG

1. FOLLOWING IS TEXT OF NOTE TO FRG DATED APRIL 14, 1978.

QUOTE. THE DEPARTMENT OF STATE ACKNOWLEDGES RECEIPT OF THE NOTE, DATED DECEMBER 23, 1977, FROM THE EMBASSY OF THE FEDERAL REPUBLIC OF GERMANY CONCERNING ANTITRUST ASPECTS OF UNITED STATES-GERMAN AIR TRANSPORT RELATIONS. THE ISSUES RAISED BY THE EMBASSY ARE CONSIDERED OF FUNDAMENTAL IMPORTANCE TO THE GOVERNMENT OF THE UNITED STATES, AND HAVE ACCORDINGLY BEEN GIVEN CAREFUL CONSIDERATION.

QUOTE. THE GOVERNMENT OF THE UNITED STATES IS FIRMLY OF THE VIEW THAT THERE IS NO CONFLICT BETWEEN THE UNITED STATES-FEDERAL REPUBLIC OF GERMANY AIR TRANSPORT AGREEMENT OF 1955 (THE INNER QUOTE AGREEMENT END INNER QUOTE) AND THE ANTITRUST LAWS OF THE UNITED STATES. THE TWO
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REGULATORY REGIMES CAN SUCCESSFULLY COEXIST, AS THEY HAVE FOR MORE THAN TWENTY YEARS. THE UNITED STATES IS UNDER NO OBLIGATION BY VIRTUE OF THE AGREEMENT TO MODIFY ITS DOMESTIC ANTITRUST LEGISLATION. SIMILARLY, WE WOULD NOT MAINTAIN THAT THE FEDERAL REPUBLIC OF GERMANY IS REQUIRED BY THE AGREEMENT TO PROVIDE A BLANKET EXEMPTION OF

INTERNATIONAL AVIATION FROM ITS DOMESTIC CARTEL LAW.

QUOTE. THE 1955 AGREEMENT CONTEMPLATES THAT INTERNATIONAL RATES MAY BE ESTABLISHED BY AGREEMENT OF AIR CARRIERS, BUT ONLY IN SPECIFIED CIRCUMSTANCES. ARTICLE 11(C) AUTHORIZES THE USE OF RATES CONCLUDED UNDER IATA PROCEDURES, BUT ONLY DURING PERIODS FOR WHICH THE UNITED STATES CIVIL AERONAUTICS BOARD HAS APPROVED THOSE PROCEDURES AND ONLY WHERE THE RESULTANT RATE AGREEMENT HAS ALSO RECEIVED GOVERNMENTAL APPROVAL. THIS PROVISION IS CONSISTENT WITH US DOMESTIC LAW, INCLUDING THE ANTITRUST LAWS. SECTION 412 OF THE US FEDERAL AVIATION ACT OF 1958 (49 U.S.C. SEC. 1382) REQUIRES EVERY AIR CARRIER TO FILE WITH THE BOARD ANY AGREEMENT WITH OTHER CARRIERS RELATING TO, INTER ALIA, THE ESTABLISHMENT OF TRANSPORTATION RATES, FARES OR CHARGES. THE BOARD IS DIRECTED TO DISAPPROVE AGREEMENTS ADVERSE TO THE PUBLIC INTEREST AND TO APPROVE ALL OTHER AGREEMENTS. SECTION 414 OF THAT ACT (49 U.S.C. SEC. 1384) PROVIDES ANTITRUST IMMUNITY FOR PERSONS ACTING PURSUANT TO SUCH AN APPROVED AGREEMENT.

QUOTE. THIS IS THE ONLY REFERENCE IN THE 1955 AGREEMENT TO THE SUBJECT OF INTERCARRIER DISCUSSIONS. THE OBVIOUS IMPLICATION IS THAT DISCUSSIONS OTHER THAN THOSE AUTHORIZED BY ARTICLE 11(C) ARE NOT CONTEMPLATED, PARTICULARLY WHERE THEY WOULD VIOLATE THE DOMESTIC LAW OF UNCLASSIFIED

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EITHER CONTRACTING PARTY. FOR EXAMPLE, THE BALANCE OF ARTICLE 11, WHICH IS TO APPLY IF THE CONDITIONS OF ARTICLE 11(C) ARE NOT MET, CONTEMPLATES INDIVIDUAL CARRIER FILINGS WITH THE RESPECTIVE AERONAUTICAL AUTHORITIES OF THE TWO GOVERNMENTS. INTERCARRIER DISCUSSIONS PRECEDING SUCH FILINGS WOULD BE CONSISTENT WITH US DOMESTIC LAW ONLY IF PRIOR AUTHORIZATION WERE SOUGHT AND OBTAINED FROM THE US CIVIL AERONAUTICS BOARD.

QUOTE. WITH REGARD TO PARTICULAR POINTS RAISED BY THE EMBASSY'S DECEMBER 23 NOTE, WE STRONGLY DISAGREE THAT THE CITED PROVISIONS OF THE AGREEMENT COMPEL INTERCARRIER DISCUSSIONS. WE RESPOND IN THE ORDER SUGGESTED BY THE EMBASSY NOTE:

QUOTE. (1) THE UNITED STATES DOES NOT SHARE THE FEDERAL REPUBLIC'S INTERPRETATION OF THE INTRODUCTORY PARAGRAPH OF ARTICLE 11. THAT PARAGRAPH MERELY REQUIRES THAT RATES BE REASONABLE. IT LISTS SEVERAL FACTORS RELEVANT TO THE QUESTION OF REASONABILITY, INCLUDING THE RELATIONSHIP OF A FILED RATE TO THE RATES CHARGED BY OTHER CARRIERS.

THESE FACTORS ARE ONES TO BE TAKEN INTO ACCOUNT BY THE AERONAUTICAL AUTHORITIES OF EACH GOVERNMENT IN ACTING UPON FILED RATES PURSUANT TO THE PROCEDURES SET FORTH IN THE REMAINDER OF THE ARTICLE. THIS PARAGRAPH CAN IN NO SENSE BE CONSTRUED AS CONTEMPLATING, AUTHORIZING, OR REQUIRING DISCUSSIONS AMONG CARRIERS CONCERNING RATES.

QUOTE. (2) THE FAIR AND EQUAL OPPORTUNITY TO OPERATE SERVICES ON ANY AGREED ROUTE, ESTABLISHED BY ARTICLE 8, SIMILARLY DOES NOT ESTABLISH THE RIGHT OF INTERCARRIER CONSULTATIONS. THE PROVISION GUARANTEES THE RIGHT OF ONE PARTY'S CARRIER OR CARRIERS TO RESPOND TO AND MATCH FARE LEVELS FILED BY THE OTHER'S, BUT PRIOR CONSULTATIONS ON FARE LEVELS ARE NOT NECESSARY TO PROTECT THAT RIGHT.
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IT WOULD BE A DISTORTION OF THIS STANDARD INNER QUOTE FAIR COMPETITION END INNER QUOTE PROVISION, FOUND IN BERMUDA-TYPE AGREEMENTS, TO READ IT AS COMPELLING AN ABANDONMENT OF COMPETITION.

QUOTE. (3) WE DO NOT SEE THE RELEVANCE OF ARTICLE 11(F) TO THE QUESTION WHETHER THE 1955 AGREEMENT COMPELS THE GRANTING OF WAIVERS FROM DOMESTIC ANTITRUST LEGISLATION. THE 1977 ANTITRUST PROCEEDING AGAINST DEUTSCHE LUFTHANSA AG AND TWO UNITED STATES CARRIERS HAS BEEN TERMINATED PURSUANT TO AN AGREEMENT BETWEEN THE PARTIES. THUS THERE IS NO LONGER AN ISSUE WHETHER THE UNITED STATES SHOULD HAVE SOUGHT CONSULTATIONS WITH THE FEDERAL REPUBLIC OF GERMANY PRIOR TO INSTITUTING THAT ACTION. WE REITERATE OUR VIEW, HOWEVER, THAT ARTICLE 11(F) IS BY ITS TERMS APPLICABLE ONLY TO DISPUTED RATES AND NOT TO DISPUTED RATE-SETTING PROCEDURES. IN ANY EVENT, ARTICLE 11(F) PROVIDES NO SUPPORT FOR THE VIEW THAT THE 1955 AGREEMENT COMPELS EITHER CONTRACTING PARTY TO MODIFY ITS DOMESTIC ANTI-CARTEL LEGISLATION.

QUOTE. THE GOVERNMENT OF THE UNITED STATES HOPES THAT THIS NOTE ADEQUATELY CLARIFIES THE UNITED STATES POSITION ON THE INTERPRETATIVE QUESTIONS RAISED BY THE FEDERAL REPUBLIC OF GERMANY. DEPARTMENT OF STATE, WASHINGTON.
UNQUOTE. CHRISTOPHER

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